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In the Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL LEE FINERTY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the union did not violate its duty of fair representation under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, by calculating the reduced agency fee charged to objecting nonmember employees on a union-wide rather than a unit-by-unit basis, or by failing to provide objectors with unit-by-unit financial disclosure reports.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 113 F.3d 1288. The decision and order of the National Labor Relations Board (Pet. App. 10a-19a) and the decision of the administrative law judge (Pet. App. 19a-50a) are reported at 322 N.L.R.B. 142.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1997. The petition for a writ of certiorari was filed on August 27, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(b)(1)(A) of the National Labor Relations Act (NLRA) makes it an unfair labor practice for a union to "restrain or coerce * * * employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. 158(b)(1)(A). Section 7 of the NLRA affords employees the right to engage, or refrain from engaging, in activities in support of collective bargaining. 29 U.S.C. 157. An employer and a union may, however, contract to require as a condition of employment that unit employees maintain "membership" in the union, provided that membership is available to all and that it requires nothing more than "tender[ing] the periodic dues and the initiation fees uniformly required." 29 U.S.C. 158(a)(3); see *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963) ("Membership as a condition of employment is whittled down to its financial core."). The NLRA also permits an "agency shop" arrangement under which employees are not required to maintain "membership" in the union but are required, as a condition of continued employment, to pay to the union sums equal to the initiation fees and periodic dues paid by union members. *Id.* at 743-744.

As construed in this Court's decisions, the NLRA does not "permit[] a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment." *Communications Workers of America* v. *Beck*, 487 U.S. 735, 738 (1988). When it receives such objections from nonmember fee payers, the union must calculate "what proportion of [union] expenditures went to activities that could be charged to

dissenters" and then make an appropriate reduction in the fees required of objecting nonmembers. *Ellis* v. *Railway Clerks*, 466 U.S. 435, 457 n.15 (1984).

2. The Communications Workers of America (CWA or Union) is an International Union representing 562,000 employees in 2400 bargaining units in the United States and Canada. Most of those employees work in different bargaining units in the telecommunications industry. The remaining employees work primarily in the printing/publishing industry, the health care industry, or in state and local governments. See Pet. App. 3a-4a, 11a, 23a-24a.

The CWA is divided into eight geographic districts and 1100 affiliated locals within the United States. However, the CWA, rather than the districts and locals, is the certified bargaining representative for all employees in the 2400 bargaining units. In that capacity, the CWA oversees all aspects of the collective-bargaining process, from establishing industrywide bargaining goals on such matters as compensation, benefits, job security and working conditions, to the actual negotiation, administration and enforcement of bargaining agreements with industry employers. Representatives from the districts and locals provide assistance to the CWA with respect to many of these duties, especially contract negotiations and grievance-arbitration processing. In addition, the CWA hires district organizers who are charged with organizing new bargaining units, and it employs a legal department whose attorneys are responsible for labor-relations litigation and other legal matters associated with its role as a labor organization. See Pet. App. 11a, 23a-28a.

Many CWA collective bargaining agreements include agency shop clauses, which obligate nonmem-

bers, as a condition of continued employment, to pay an agency fee to the Union equal to normal membership dues. The CWA has established a procedure by which nonmembers may object to the payment of dues and fees expended by the Union on activities unrelated to collective bargaining. A nonmember must file an objection during the month of May for the upcoming "fee year" that runs from July 1 through June 30. Upon receipt of the objection, the CWA sends the objector an "advance reduction" check equal to the portion of an objector's fee year payment that the Union determines constitutes "nonchargeable" expenses. Along with the check, the CWA includes a disclosure report summarizing its major categories of chargeable and nonchargeable expenditures, with an explanation of how the dues reduction fee was calculated. See Pet. App. 11a-12a, 28a-29a.

A single nationwide reduced fee is calculated for all objectors based on the CWA's chargeable versus nonchargeable national expenditures, without regard to the particular bargaining unit in which an objector is employed. For example, the CWA defines strike benefits as a chargeable expense requiring the financial support of all objectors, *i.e.*, objectors employed in the unit on strike as well as objectors employed in other bargaining units in the same industry and in bargaining units in different industries. In short, the reduced fee charged to objectors does not vary according to the objector's bargaining unit, industry, or employer. Because the CWA's chargeable expenses are not calculated on a unit-by-unit basis, the disclosure report that it sends to the objectors does not break down by unit the allocation of union expenditures to the chargeable versus nonchargeable categories. See Pet. App. 12a, 29a-30a.

3. Petitioners are objecting nonmember employees in the CWA's Pacific Bell/Nevada Bell bargaining unit. The agreement covering employees in that bargaining unit contains an agency shop clause. Petitioners filed charges with the National Labor Relations Board (NLRB or Board), alleging that the CWA had breached its duty of fair representation in violation of Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), by requiring objectors to pay for representational expenses incurred outside that unit. The General Counsel investigated the charges and issued a complaint, alleging that the CWA's objection procedure is unlawful in that the union "fails to break down expenses into representational and nonrepresentational categories on a unit-by-unit basis in its disclosure statement to objecting non-members," and that it "charges objecting non-member employees for representational expenses not attributable to the unit in which they are employed." Pet. App. 13a.

The NLRB dismissed the complaint, concluding that the Union had not violated its duty of fair representation. Pet. App. 10a-18a. The Board relied (*id.* at 14a-15a) on its decision in *California Saw and Knife Works*, 320 N.L.R.B. 224 (1995), in which it had concluded that a union does not violate its duty of fair representation by "engag[ing] in cross-unit agglomeration and averaging to determine a single nationwide chargeable fee applicable to all objectors." Pet. App. 15a. The Board noted as well that the CWA (rather than the relevant local union) "is the recognized bargaining agent for all employees" in the local bargaining units. *Ibid.* In the Board's view, that fact strengthened the presumption that the "'parent will bring to bear its often considerable economic, political, and informational resources' in support of each

bargaining unit." *Id.* at 15a-16a (quoting *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 523 (1991)). The Board also concluded that the CWA "did not act unlawfully by failing to allocate its chargeable expenses on a unit-by-unit basis in its disclosure statement sent to objectors." *Id.* at 16a.

The Board made clear, however, that the CWA's calculation of the appropriate nationwide fee remained subject to challenge in an appropriate case. It observed that "the figure produced by the [CWA's] application of the formula * * * may be contested in a subsequent challenge proceeding where the [CWA] will bear the burden of proving that the local union's expenditures are chargeable." Pet. App. 17a-18a. "[A]bsent a challenge proceeding establishing the invalidity of the local presumption formula," however, the Board "h[e]ld that as an *initial* matter, the [CWA's] allocation formula is not * * * per se unlawful." *Id.* at 18a.

4. The court of appeals affirmed. Pet. App. 1a-9a. It concluded that the Board's decision was "a logical outgrowth of *Lehnert*." *Id.* at 2a. The court added that "judicial precedent supports the Board's * * * use of a 'local presumption' in allocating expenses—*i.e.*, an assumption that allocation on a union-wide basis is equivalent to allocation on a unit-by-unit basis." *Ibid.* The court also "agree[d] with the Board that unit-by-unit disclosure is not necessary to ensure that nonmembers are paying only for properly chargeable activities." *Ibid.*

In upholding the NLRB's dismissal of the General Counsel's complaint, however, the court of appeals made clear that its decision did not foreclose all challenges to the CWA's calculation of the fee charged to objecting nonmembers. Thus, the court observed that

> [b]ecause the instant case does not involve challenges to "specific representational expenses," the Board has not decided (1) whether some of the pooled charges may be impermissible (*e.g.*, charges attributable to charitable donations by the Union); or (2) whether some of the pooled charges may be collected only from employees in certain designated bargaining units (*e.g.*, money for strike funds that would be available to support employees in the private sector, but unavailable to employees in public sector units where strikes are unlawful). As the Board noted, the agency fees charged for specific representational expenses by CWA may be contested in a subsequent challenge proceeding. * * * This decision simply represents an initial finding that CWA's method of allocation is not *per se* unlawful.

Pet. App. 8a-9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is therefore not warranted.

1. The plaintiffs in *Lehnert* v. *Ferris Faculty Association*, 500 U.S. 507 (1991), contended that a public-sector union "may not utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong." *Id.* at 519.[1] This Court rejected

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[1] The plaintiffs in *Lehnert* were members of the faculty of Michigan's Ferris State College, a public institution. They did not belong to the Ferris Faculty Association (FFA) but were

that argument. The Court stated that, while it had consistently looked to whether nonideological expenses were "germane to collective bargaining," it had "never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit." *Id.* at 522. To require such a direct relationship, the Court explained, would be "to ignore the unified-membership structure" of many unions, under which "membership in the local union constitutes membership in the state and national parent organizations." *Id.* at 523. The Court continued:

> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.

Ibid. Accordingly, the Court concluded that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting

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required, under an agency shop arrangement with the college, to pay to FFA, the Michigan Education Association (MEA), and the National Education Association (NEA) a service fee equivalent to a union member's dues. See 500 U.S. at 511-513.

employees' bargaining unit." *Id.* at 524.[2] See also *Ellis* v. *Railway Clerks*, 466 U.S. 435, 448-449 (1984) (under Railway Labor Act, objecting employees may be required to contribute to the costs of the national union's conventions); *Lehnert*, 500 U.S. at 523 (citing *Ellis*).

The Court cautioned, however, that its holding should not be construed "to grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit." *Lehnert*, 500 U.S. at 524. Rather, the Court stated, "[t]here must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Ibid.* The Court provided two examples of expenditures that would not be chargeable to objectors: "a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally," and "a contribution by a local union to its parent that * * * is in the nature of a charitable donation." *Ibid.* Those expenditures, the Court explained, are "not part of the local's responsibilities as an affiliate," *ibid.*, and

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[2] In his separate opinion, joined by three other Justices, Justice Scalia differed with the majority over the appropriate standard for determining what expenditures are properly chargeable to objecting fee payers. See 500 U.S. at 557-558 (advocating a "statutory duties" test in place of the Court's "germane to collective bargaining" test). Justice Scalia agreed, however, that dissenting nonmembers could appropriately be required to contribute to the pool of collective bargaining resources available to each contributing unit. See *id.* at 561, 562 ("It is a tangible benefit * * * to have expert consulting services on call, even in the years when they are not used.").

thus are not part of the "local's affiliation fee which contributes to the pool of resources potentially available to the local [and which] is assessed for the bargaining unit's protection," *id.* at 523.

2. Petitioners' primary argument is that agency fee payers should not be compelled to fund union activity in bargaining units that are engaged in unrelated industries or lines of work, covered by other labor relations statutes, or located in different parts of the United States or Canada. Pet. 9-12. That contention misconceives the rationale underlying the Board's decision in this case. In holding that the NLRA does not require unit-by-unit fee calculations, the Board did not suggest that petitioners may be compelled "to fund collectivism in foreign nations and among public sector employees," Pet. 10, or otherwise to subsidize activities unrelated to the Union's representation of their own bargaining units. Rather, the Board has concluded—consistent with *Lehnert*—that a union acting as a collective bargaining representative may create a pool of resources that will be available, as needed, to each affiliated bargaining unit, and may finance that endeavor by requiring each potential beneficiary to contribute on a fixed periodic schedule regardless of whether a particular unit actually draws upon those resources in any given period. See pages 8-9 & note 2, *supra*. That rationale applies with equal force whether the contributing units are in the same industry in the same State, in different industries in Canada and the United States, or in different States with different collective bargaining laws within the United States.[3]

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[3] There is consequently no merit to petitioners' contention (Pet. 18-19) that the CWA's union-wide dues allocation formula

Thus, the court of appeals properly concluded that the Board's decision in this case was "a logical outgrowth of *Lehnert*" and that petitioners had failed to demonstrate a breach of the Union's duty of fair representation. Pet. App. 2a. Indeed, as the Board noted, "there is an even greater justification than in [*Lehnert*] for the [CWA's] practice of charging all objectors a uniform nationwide service fee because, unlike the international union[] in [*Lehnert*], the [CWA] here is the recognized bargaining agent for all employees." *Id.* at 15a. "In that role," the Board explained, "there is a stronger presumption than when a local union is the bargaining representative, that the 'parent will bring to bear its often considerable economic, political, and informational resources' in support of each bargaining unit." *Id.* at 15a-16a (quoting *Lehnert*, 500 U.S. at 523).

3. Contrary to petitioners' contention, the Board's rationale is fully consistent with "the existence of discrete and clearly defined bargaining units" (Pet. 12) contemplated by the NLRA. Although the NLRA presupposes the existence of discrete bargaining units, nothing in the Act requires unions to formulate their bargaining strategies on a unit-by-unit basis. "[A] union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union." *Mine Workers* v. *Pennington*,

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gives the NLRA an impermissible extraterritorial effect. Although the CWA has locals in Canada, the dues paid to the CWA by the Pacific Bell/Nevada Bell bargaining unit are assessed for that bargaining unit's protection, not for the purpose of organizing employees in Canada or influencing the course of bargaining in the CWA's Canadian units.

381 U.S. 657, 665 n.2 (1965). And a union may engage in coordinated bargaining along with the other unions representing other bargaining units. *General Electric Co.* v. *NLRB*, 412 F.2d 512, 516-520 (2d Cir. 1969).[4] A union enjoys the same latitude in determining how best to "provide bargaining expertise or financial support" in representing the various units that have chosen it as their bargaining agent. *NLRB* v. *Financial Institution Employees*, 475 U.S. 192, 199 n.5 (1986). The CWA's cost-pooling method of financing collective bargaining activities is well within the "wide range of reasonableness [that] must be allowed a statutory bargaining representative in serving the unit it represents." *Air Line Pilots* v. *O'Neill*, 499 U.S. 65, 75 (1991) (quoting *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953)).

4. Like the court in the instant case, other courts of appeals have held that a union may permissibly employ a "local presumption"—*i.e.*, an assumption that the allocation between chargeable and non-chargeable expenditures for the overall union is equivalent to the

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[4] In certain circumstances, it may be unlawful for a union to refuse to sign a negotiated agreement in one unit in order to respond to union demands affecting another unit. The Board found such to be the case in *Paperworkers Local 620 (International Paper Company)*, 309 N.L.R.B. 44 (1992) (cited at Pet. 13), where it invalidated a "pooled" voting system that would have allowed the employees in one bargaining unit to veto contract ratification decisions made by employees in other units. The wrong in such a case, however, is the refusal to sign agreements that have already been negotiated, see *Paperworkers*, 309 N.L.R.B. at 45 ("The result [of the pooled voting arrangement] is a system that allows for refusal to sign an agreement on the basis of a nonmandatory subject of bargaining."), not the decision to devise a bargaining strategy that takes into account the interests of all represented units.

allocation for each of its local units—in allocating chargeable expenses. See, *e.g.*, *Crawford* v. *Air Line Pilots Ass'n Int'l*, 992 F.2d 1295, 1301 (4th Cir.) (en banc), cert. denied, 510 U.S. 869 (1993); *Pilots Against Illegal Dues* v. *Air Line Pilots*, 938 F.2d 1123, 1128-1129 (10th Cir. 1991); *Price* v. *International Union, UAW*, 927 F.2d 88, 92 (2d Cir.), cert. denied, 502 U.S. 905 (1991). Petitioners cite no contrary authority.[5]

5. Finally, both the Board (Pet. App. 16a n.4, 17a-18a, 41a n.14) and the court of appeals (*id.* at 8a-9a) recognized that the dismissal of the complaint in this case does not foreclose all challenges to the manner in which the CWA calculates the agency fee charged to objecting nonmember employees. As the court of appeals explained, "the Board has not decided (1) whether some of the pooled charges may be impermissible (*e.g.*, charges attributable to charitable donations by the Union); or (2) whether some of the pooled charges may be collected only from employees in certain designated bargaining units." *Ibid.*[6] The Board's "decision simply represents an initial finding that CWA's method of allocation is not *per se* unlawful." *Id.* at 9a.

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[5] Having rejected petitioners' claim that the CWA was required to calculate the objecting nonmembers' fees on a unit-by-unit basis, the court of appeals was correct in holding that "unit-by-unit financial disclosure is not necessary to ensure that nonmembers are paying only for properly chargeable activities." Pet. App. 9a.

[6] As an example of charges that might fall into the latter category, the court referred to "money for strike funds that would be available to support employees in the private sector, but unavailable to employees in public sector units where strikes are unlawful." Pet. App. 9a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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